

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

<i>In the Matter of:</i>)	
)	
<i>Cross-Ownership of Broadcast Stations and Newspapers</i>)	MM Docket No. 01-235
)	
<i>Newspaper/Radio Cross-Ownership Waiver Policy</i>)	MM Docket No. 96-197
)	
)	
To: The Commission		

COMBINED RADIO CORP. OF WEST VIRGINIA
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Respectfully submitted,

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December 3, 2001

SUMMARY

West Virginia Radio Corporation (WVRC) submits that the Newspaper-Broadcast Cross-Ownership (“NBCO”) rules, as restrictions on a broadcaster or newspaper publisher’s rights to free expression can no longer be justified as being in the public interest. The public interest rationale for the NBCO Policy – diversity of ownership and viewpoint – no longer exists. There is no longer a lack of diversity of viewpoints in the media marketplace; quite the contrary is true when one considers the explosion of newer forms of electronic media and the Internet. This is true even after taking recent media consolidations into account.

Nor do more recently-articulated rationales, such as “market competition” support retention of the NBCO rules. Current methods of analyzing media concentration are incomplete, overly simplistic and produce flawed, unreliable results. Moreover, other federal (as well as State) agencies are better suited to investigate and adjudicate market concentration issues. The Commission’s authority to do so under its present charter has always been suspect.

WVRC submits that retention of the NBCO rules is actually *counterproductive*: it exacerbates an already disturbing trend toward the death of the daily newspaper: the number of dailies across the U.S. has steadily declined every year except one since 1987, thus *reducing*, not enhancing diversity. Moreover, the rules can no longer pass “intermediate” First Amendment scrutiny under *United States v. O’Brien*, as they unnecessarily impinge on broadcasters’ and newspaper publishers’ First Amendment rights to determine the content and the medium of their messages.

If the NBCO Policy is to be retained in some form, at the very least it must be reduced significantly in scope. Restrictions against newspaper-radio local combinations must be eliminated as totally unjustified. Moreover, NBCO restrictions should become the exception, not the rule. Cross-ownership should be allowed except in the few “egregious cases” using the

criteria the Commission used in 1975 to determine whether or not existing combinations should be required to divest. Finally, in any application of a downsized NBCO policy, market definitions and “voice count” criteria should be reworked to take into account the *actual* competitive environment that broadcast media operate in. To exclude from consideration other media on the basis that, in the Commission’s unexamined judgment, they are not “significant” sources of information and alternative viewpoints is unreasonable arbitrary and capricious.

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**COMMENTS OF WEST VIRGINIA
RADIO CORPORATION**

Comes now WEST VIRGINIA RADIO CORPORATION (“WVRC”), by Counsel, and pursuant to Sections 1.415 and 1.429 of the Commission’s Rules (47 CFR §§1.415, 1.419), and Paragraph 55 of the Commission’s *Order and Notice of Proposed Rule Making* in the above-captioned proceeding,¹ hereby respectfully submits these Comments, and requests that the recommendations contained herein be duly considered and adopted. In support whereof, the following is shown.

I. INTRODUCTION.

A. *Background of Proceeding.*

¹ DA FCC 01-262, ** F.R. ***, released September 20, 2001 (hereafter “*NPRM*”).

1. On September 20, 2001 the Commission released the above-referenced NPRM to consider whether the current Newspaper-Broadcast Cross-Ownership (“NBCO”) rules currently in effect² should be relaxed, modified or eliminated. In addition, it asked for comments on whether or not its current waiver policy with respect to radio-newspaper combinations should be modified in the event that it decides that no change in the rules should be adopted.³ In reopening its previous inquiries, the Commission noted that it was committed to reviewing its rules in light of the changed conditions in the media marketplace. As the Commission stated when it originally adopted the rule, “[t]he Commission is obliged to give recognition to the changes which have taken place and see to it that its rules adequately reflect the situation as it is, not was.”⁴

2. This is the third notice and comment rule making proceeding within the past five years wherein the Commission has stated its intention to review the twenty-five year old cross-ownership restriction. In MM Docket 96-197, the Commission initiated a *Notice of Inquiry* concerning its policy for waiving application of the rule and whether that policy should be

² 47 CFR §73.3555(d) and related Notes.

³ NPRM, ¶1.

⁴ Amendment of Sections 73.34, 73.240, and 73.636 of the Commission’s Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations, Docket No. 18110, *Second Report & Order*, 50 FCC 2d 1046, 1075, 32 RR 2d 954, 983, ¶100 (1975) (“*Second Report & Order*”), *recon.* 53 FCC 2d 589 (1975), *aff’d sub nom. FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775 (1978) (*NCCB*).

modified for newspaper/radio combinations.⁵ No action was taken by the Commission in that proceeding. Instead, the Commission stated in the present *NPRM* that the issues raised by the 1996 Newspaper/Radio NOI were to be subsumed within the present proceeding, which considers both rule and waiver changes for both newspaper/radio and newspaper/TV combinations.⁶

⁵ Newspaper/Radio Cross-Ownership Waiver Policy, MM Docket No. 96-197, *Notice of Inquiry*, 11 FCC Rcd 13003 (1996) (*Newspaper/Radio NOI*).

⁶ The Commission then gave notice that MM Docket 96-197 was being terminated as a separate proceeding. *NPRM*, Note 16.

3. In 1998, as part of its Biennial Regulatory Review mandated by the Telecommunications Act of 1996, the Commission issued another *Notice of Inquiry* on a number of its broadcast ownership rules including the NBCO rules.⁷ However, the Commission, in its *Biennial Review Report* issued two years later, concluded that no change in the NBCO rules should be adopted.⁸

⁷ “1998 Biennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996,” MM Docket No. 98-35, *Notice of Inquiry*, 13 FCC Rcd 11276 (1998) (*Biennial NOI*). The Commission incorporated the record from the *Newspaper/Radio NOI* into the record of the *Biennial NOI*. 13 FCC Rcd at 11286, ¶ 30.

⁸ “1998 Biennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996,” MM Docket No. 98-35, *Report*, 15 FCC Rcd 11058, 11102, ¶ 83 (2000) (“*Biennial Review Report*”). The Commission did suggest, however, that there may be some cases where given the size of the market and the proposed newspaper-broadcast combination, the rule might not be necessary to assure diversity of viewpoints. It also suggested that that the NBCO rules might become the subject of a separate rule making proceeding. *NPRM*, ¶7.

4. Prior to the release of the 1998 Biennial Review Report, the Commission adopted in a separate Report and Order several modifications to its Television ownership rules including a relaxation of the local television ownership rule and the radio-television one-to-a-market rule.⁹ In response to the 1999 Television Ownership Order, the Newspaper Association of America (“NAA”) petitioned the Commission for emergency relief to prevent newspaper-broadcast combinations from being foreclosed from participating in what NAA termed a prospective “land rush” in response to the modified television ownership rules.¹⁰ NAA argued that (1) the Commission has not fulfilled its legal obligation to repeal or modify all of the broadcast local ownership rules that no longer serve the public interest; (2) the FCC’s failure to act would serve to irreparably exclude newspaper publishers from participating in the consolidation opportunities created by the Commission’s new local television ownership rules; and (3) the factual and legal underpinnings of the NBCO rules had been eliminated by marketplace developments and the Commission’s own actions. WVRC as well as other parties submitted comments in support of NAA’s petition.¹¹ The Commission declined to issue any response to the NAA Petition except to acknowledge and incorporate NAA’s comments by reference in MM Docket 98-35. As noted by the Commission in the instant *NPRM*, NAA challenged the Commission’s decision not to repeal the NBCO rules in the U.S. Court of Appeals for the District of Columbia Circuit.¹² The Court has deferred acting on the case but is requiring periodic status reports from the parties.¹³

⁹ *Review of the Commission’s Regulations Governing Television Broadcasting* (FCC 99-209), 14 FCC Rcd 12903, 17 CR 1, 64 FR 50651, 64 FR 54225, 1999 FCC LEXIS 3817, released August 6, 1999 (“1999 Television Ownership Order.”)

¹⁰ “Emergency Petition for Relief of the Newspaper Association of America,” filed August 23, 1999 (“NAA Petition”).

¹¹ See, “Comments of West Virginia Radio Corporation on NAA Petition for Emergency Relief,” MM Dockets 98-35 and 96-197, filed September 17, 1999 (incorporated herein by reference).

¹² *Newspaper Ass’n of America v. FCC*, Case No. 00-1375 (D.C. Cir. filed August 16, 2000).

¹³ *NPRM*, note 24.

5. The instant *NPRM* seeks to update the record started in 1996 in MM Docket 96-197, and has asked for public comment on a number of additional issues:

- (1) *Whether the NBCO rules continue to be necessary to protect a diversity of viewpoints;*
- (2) *What impact new media outlets, including the Internet, have on the sources consumers use for local news and information;*
- (3) *What effect media ownership diversity has on viewpoint diversity in a market, and whether commercial incentives would be sufficient to protect the public's access to a variety of viewpoints from commonly owned media;*
- (4) *What impact the rule has on advertising in a market, and whether advertising in one medium is a substitute for advertising on another medium in a market;*
- (5) *Whether the relevant geographic market should be changed or kept the same for purposes of applying the newspaper/broadcast cross-ownership rule;*
- (6) *What public benefits accrue from efficiencies and synergies of joint operation of a broadcast station and a newspaper, and whether there is a difference in efficiencies between combining a newspaper and radio station as compared to combining a newspaper and TV station;*
- (7) *What impact the U.S. Court of Appeals, D.C. Circuit, decision in the Time Warner case striking down two cable television ownership rules has on analysis of this rule;*
- (8) *Whether the Commission should add a "market concentration" standard under which combinations between newspapers and broadcast stations might be permitted so long as their combined or individual market shares do not exceed a certain level;*
- (9) *Whether the FCC should add a "voice count" standard, such as the one applied in the radio/TV cross-ownership rule, to permit combinations so long as a certain number of independently-owned media "voices" would remain in the market post-merger;*
- (10) *Whether the FCC should adopt a structural separations approach which would permit broadcast/newspaper combinations subject to certain distinct management and reporting structures to preserve editorial independence between the commonly-owned media;*
- (11) *Whether the Commission's current policy that allows a broadcast station licensee to retain a newspaper it subsequently acquires in its community until the station's next license renewal date should be modified in light of the lengthier term of broadcast licenses.*

In the Comments below, WVRC will address these and other issues.

B. *Statement of Interest.*

6. WVRC is the Licensee of Radio Stations WAJR (AM) and WVAQ (FM). Morgantown, West Virginia, and WSSN (FM), Weston, West Virginia.¹⁴ The majority owners of WVRC also have majority control of the following affiliated broadcast companies:

<u><i>Affiliate Licensee Name</i></u>	<u><i>Call Sign(s) and Community</i></u>
West Virginia Radio Corporation of Elkins	WDNE AM-FM, Elkins, WV
West Virginia Radio Corporation of Clarksburg	WFBY (FM), Clarksburg, WV
West Virginia Radio Corporation of Salem	WAJR-FM, Salem, WV
West Virginia Radio Corporation of Charleston	WCAW (AM), WCHS (AM), WSWW (AM), WKWS (FM) & WVAF (FM), Charleston, WV, WKAZ (FM), Miami, WV, & WRVZ (FM), Pocatalico, WV

¹⁴ WVRC also owns and operates MetroNews, which provides news, features and sports programming via satellite to approximately 55 radio stations in West Virginia.

7. In addition to the above broadcast interests, the principals of WVRC own 100% of the voting stock of West Virginia Newspaper Publishing Company, publishers of the Morgantown DOMINION POST, a daily newspaper having general circulation in the city of Morgantown, West Virginia.¹⁵ Apart from common ownership at the corporate level, the publishing company and broadcasting company share no staff and no operating facilities. News gathering and reporting staffs and facilities of the two companies are completely separate and do not interact. Nor is there a joint sales staff. The two companies historically have been operated completely separate.¹⁶ Accordingly, as part of a grandfathered newspaper-broadcast combination,¹⁷ WVRC has a direct interest in the outcome of this proceeding.

A R G U M E N T

II. THE NBCO RULES SHOULD BE ELIMINATED.

¹⁵ Paid circulation of the DOMINION-POST is approximately 20,000 (*see infra*, ¶72).

¹⁶ The two companies do share space in a commonly-owned building, and certain corporate-level general and administrative, and accounting functions are performed by personnel common to both companies. Such personnel are not involved in day-to-day programming/publishing decisions or with editorial policy. The boards of directors of each company, however, have a number of common members.

¹⁷ The newspaper-broadcast combination is a “grandfathered” facility, having been in existence prior to 1975. *See*, “Amendment of Sections 73.34, 73.240, and 73.636 of the Commission’s Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations,” Docket No. 18110, *Second Report & Order*, 50 FCC 2d 1046 (1975), *recon.* 53 FCC 2d 589 (1975), *aff’d sub nom. FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775 (1978); *NPRM*, ¶3.

8. WVRC respectfully submits that any policy deliberation regarding the present status and future enforcement of the NBCO rules cannot be undertaken without first examining their *purpose*, whether they are necessary to protect the public interest, and, indeed, whether they are, in fact, *counterproductive* to the public interest as well as violative of the First Amendment to the Constitution of the United States. WVRC submits that an analysis of the present mass media environment will demonstrate that the NBCO rules are no longer necessary, and indeed, counterproductive to the Commission's twin goals of diversity and competition.

9. WVRC also submits whatever constitutional basis existed for such rules twenty-five years ago has long since evaporated. That being the case, these rules can no longer withstand constitutional scrutiny, and must be repealed as contrary to the First Amendment. Even assuming that the level of scrutiny to be employed in assessing the constitutionality of the NBCO rules is "intermediate" rather than "strict," the NBCO prohibitions still fail to pass constitutional muster because (1) they do not advance an important governmental interest unrelated to the suppression of speech, and (2) even if a compelling governmental interest found to be were significant, as presently constituted the NBCO rules burden substantially more speech than necessary to further such an interest.

A. The Rationale Underlying the NBCO Policy No Longer Exists.

1. The Policy Was Based Upon a Perceived Lack of Media Diversity.

10. In adopting the NBCO rules, the Commission stated that its primary concern was media diversity, and not anti-trust considerations.¹⁸ The Commission also acknowledged that at one time it had actually encouraged co-ownership of newspaper and broadcast facilities because of a shortage of qualified license applicants. However, by 1975, the Commission had concluded that a sufficient number of qualified and experienced applicants other than newspaper owners was now available. In addition, the Commission noted that the number of new channels open for new licensing had diminished substantially.¹⁹

11. In *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978) the Supreme Court upheld the NBCO policy on such as basis, stating that the policy was a “reasonable administrative response to changed circumstances in the broadcasting industry.” The Court made reference to the Commission’s statement in the 1975 *Second Report and Order* adopting NBCO that media diversity was its primary concern.

¹⁸ *Second Report and Order*, *supra* Note 17 at ¶110. In fact, the Commission acknowledged that it may not have the jurisdiction to determine violations of antitrust laws, citing *Northern Natural Gas Co. v. FPC*, 399 F.2d 953, 960-61 (D.C. Cir. 1968). *Id.*

¹⁹ *Second Report and Order*, *supra*, Note 17.

12. Citing to previous decisions where it had upheld the validity of an FCC regulation as against a First Amendment challenge (*e.g.*, *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943); *Associated Press v. United States*, 326 U.S. 1 (1945); *United States v. Storer Broadcasting*, 351 U.S. 192 (1956); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969)) the Court dismissed facial challenges to the NBCO Rules filed by several intervenors, including ANPA (now “Newspaper Association of America” (“NAA”)) and the National Association of Broadcasters (“NAB”). Finally, the Court distinguished cases cited by the intervenors where it had previously struck down federal laws which imposed conditions on the receipt of a federal benefit tantamount to surrendering First Amendment rights (*e.g.*, *Speiser v. Randall*, 357 U.S. 513 (1958); *Elrod v. Burns*, 427 U.S. 347 (1976)). The regulations in question in those cases directly abridged freedom of expression since a denial was based solely on content; here, the regulations were not content-related, said the Court, and their purpose and effect is to promote free speech (*i.e.*, diversity) not to restrict it.²⁰

2. *There is No Longer a Lack of Diversity in the Media Marketplace.*

13. From a public policy perspective, a significant basis for overturning the regulatory constraints against newspaper-broadcast cross ownership is that *changed circumstances* warrant their elimination. Since “changed circumstances” was the basis for both the Commission adopting NBCO, and for the Supreme Court finding the NBCO rules reasonable twenty-three years ago, the same rationale justifies their repeal today.²¹

14. As noted by the Commission in the *NPRM*, in 1975 there were approximately 1,700 daily newspapers,²² approximately 7,500 radio stations, and fewer than 1,000 television

²⁰ *FCC v. NCCB*, *supra*. 436 U.S. 775 (1978).

²¹ The Commission itself has acknowledged, then and now, that changed circumstances require changes in public policy. *See NPRM*, ¶1 and note 3.

²² The actual number, according to the NAA, was 1,756. NAA, *Facts About Newspapers*, 2001 Ed.,

stations.²³ The three commercial television networks had a combined prime time audience share of 95%.²⁴

p. 14.

²³ *NPRM*, ¶1.

²⁴ *Id.* (citing Nielsen Media Research).

15. Even ten years after the adoption of the NBCO Rules, it had become clear that changed circumstances had eliminated the need for the rules, and that their continued enforcement was exacerbating the problem of declining newspaper ownership and readership as an alternative media. Between 1975 and 1987, for example, the number of dailies had declined from 1,756 to 1,645 • a reduction of 111 daily newspapers.²⁵ And, while total circulation of dailies during the same period had increased by approximately 2.2 million, it had declined as a ratio of population growth, from 28.15% to 25.93%.²⁶

16. Based upon the data collected *since* 1987, WVRC concludes that the alarming trend is not slowing down, but accelerating. Between 1975 and 2000, for example, 276 daily newspapers have ceased operation, bringing the total down from 1,756 (in 1975) to 1,480 (in 2000). Even more alarming is the fact that general circulation for daily newspapers has actually *decreased* by over *seven million*²⁷ since 1987, having declined almost every year, in fact, between a high of 62,826,273 combined morning and evening circulation in 1987 and 55,772,847 in 2000.²⁸ When one compares this negative trend with the phenomenal growth of the electronic media (which has continued unabated since 1987), a significant case can continue to made – in

²⁵ NAA, *Facts About Newspapers*, 1990 Ed.

²⁶ *Id.* Subsequent to 1987 total daily circulation (combined morning and evening) actually *decreased*, and has been on the decline ever since. *Facts About Newspapers*, 2001 Ed., p. 16.

²⁷ In 1987 total daily (*i.e., morning and evening*) circulation was at an all-time high of 62,826,273. By 2000, total daily newspaper circulation had dwindled to 55,772,847, a loss of 7,053,426. SOURCE: NAA, *Facts About Newspapers*, 1996 ed., p. 16; NAA, *Facts About Newspapers*, 2001 ed., p. 16.

²⁸ *Id.*

fact more telling since 1987 – that the NBCO rules are not only no longer necessary but actually may be hastening the demise of the local daily newspaper.

17. With respect to broadcast stations, the numbers go in the other direction. There are now, by the Commission's own count, over 13,000 full service radio stations – *double* the number that existed at the time of adoption of the NBCO policy.²⁹ In addition, there are now on the air 1,686 full service television stations, 424 Class A UHF and VHF television stations and 2,212 LPTV stations.³⁰

²⁹ This number does not include the approximately 8,000 FM Boosters and Translators nor the new Low Power FM assignments.

³⁰ According to a news release from the Commission dated October 30, 2001, as of September 30, 2001, there were a total of 25,696 broadcast stations, broken down as follows:

AM Stations	4727	Class A UHF Stations	336
FM Commercial	6051	Class A VHF Stations	88
FM Educational	2234	Total	424
Total	13,012		
UHF Commercial TV	737	FM Translators/Boosters	3600
VHF Commercial TV	572	UHF Translators	2658
UHF Educational TV	252	VHF Translators	2104
VHF Educational TV	125	Total	8,362
Total	1,686		
UHF Low Power TV	1674	Total Broadcast Stations:	25,696
VHF Low Power TV	538		
Total	2,212		

18. Moreover, at the time of the adoption of the NBCO rules, none of the more exotic forms of electronic media were even in the planning stage; some were nothing more than the gleam in the eye of a science fiction writer. The incredible explosion of electronic mass media outlets including Cable TV with audio channels, Digital Audio Radio Services (“DARS”), Direct Broadcast Television Service (“DBS”), MDS, MMDS, IVDS, electronic billboards, compact disks, video games for home computers, telephone dial-up audio programming services, local computer bulletin board services (“BBS”), and the vast reaches of cyberspace *via* the Internet•all new and competing technologies since the adoption of the NBCO rules in 1975 – has placed the information consumer in a position of having too many, not too few, choices to obtain information and other programming. All of these “real time” information sources compete for the attention and dollars of the information consumer who only has 24 hours in a day to partake of these varied services.³¹ Accordingly, given the vast explosion of alternative sources of information available to the public, WVRC concludes that the NBCO rules are no longer necessary to maintain a diversity of viewpoints available to the information consumer.

³¹ Most observers acknowledge that during the recent national crisis occasioned by the September 11, 2001 terrorist attacks, the Internet played a vital role in keeping the public informed and up-to-date. News sites on popular internet services such as AOL, CompuServe, Yahoo and MSN continued to update reports on terrorist attacks and provided valuable information regarding blood donor collection facilities during the immediate aftermath of the attacks. Later, websites for government agencies such as the Center for Disease Control and the U.S. Postal Service posted information on the dangers of anthrax infection and what could be done to minimize the risk of inadvertent exposure to the disease.

While it is certainly true that the Internet was also the source of rumor, hoaxes and misinformation, the same can be said for the print and broadcast media. All real-time media made the effort, however, to correct and update stories that previously contained incorrect information.

3. *Recent Industry Consolidations Have Not Reduced Viewpoint Diversity, and Have Contributed to Media Program Diversity.*

19. Fundamentally at issue is the question of whether there is a direct connection between media ownership diversity and media viewpoint diversity. Underlying not only the NBCO rules but all regulatory restrictions on local ownership is the Commission's belief that the two are mutually interchangeable concepts. Critics of the recent consolidation of ownership in media markets are quick to argue that there has been a resulting decline in diversity of viewpoint and program choice. To the contrary, the consumer in today's media marketplace is overwhelmed by the diversity of choices in both substance and viewpoint now available.

20. The cable television system owner in most media markets provides many more channels than just the twelve VHF channels available on the 1960's television receiver. The channel selection box interfacing the coax cable coming into the home and the connection to the TV set allows for the delivery of hundreds of channels. Once a cable system has converted to digital signal propagation, the consumer is able to access up to 500 channels. No one seriously believes that the cable operator, as the gatekeeper of those various channels, selects among the total available only those with political, social, or economic viewpoints consistent with its own. Yet those who equate media ownership with media viewpoint diversity mean just that.

21. With respect to consolidation of the radio industry, the listening public has been the beneficiary of *greater* diversity, not less. Whereas, the licensee of a standalone operation or even of an AM-FM combination was limited in the number of programming choices it could use and remain economically viable, the licensee of a consolidated group of four or more stations can afford to take greater risks and offer *niche* programming that could not be offered otherwise. The public is served, in general, whenever there is a greater diversity of choices of programming available. But the *public interest* is better served when some of those new choices target traditionally neglected segments of the population.

22. WVRC's own experience in the Charleston, West Virginia radio market serves as one example. As noted above, WVRC's sister corporation, West Virginia Radio Corporation of Charleston ("WVRCC"), is licensee of four FM and three AM broadcast stations in the Charleston, West Virginia market. WVRCC has programmed each of these stations with a *separate* programming format.

23. WCHS (AM), for example, is formatted as a news-talk station, the only commercial radio station with such a format in the Arbitron-defined Charleston, WV market. Over seven hours per day of news and public affairs programming over WCHS is *locally produced*.³² The balance of news/talk programming is either network news or syndicated public affairs features, such as Rush Limbaugh, as well as some regional sports network programming. The cost of providing this kind of programming is much greater than airing solely a musical entertainment format. The latter may generate greater numbers of listeners, which, in turn, generate greater advertising revenues, without which, the more expensive news and public affairs programming could not be provided. Thus, radio consolidation has made possible the providing of more costly programming.

³² WVRC has five full-time news department employees. This does not include talk-show hosts and other personnel who discuss the news on public affairs or call-in programs.

24. Moreover, since January, 2001, WVRC has been programming WRVZ (FM), Pocatalico, West Virginia, with an ethnic/urban format (“The Beat”), in an attempt to provide service to the African-American community in Charleston. Based upon Arbitron’s Spring, 2000 Survey, community response to the change in format has been very positive.³³ A number of leaders in the black community in Charleston expressed gratitude to WVRCC for addressing the needs and concerns of a segment of the Charleston population that up until now has been ignored and overlooked. Without the synergy made possible by joint operation of a consolidated group of stations, devoting the programming of a radio station which targets an audience comprising only six percent (6%) of the MSA population would have been totally unfeasible.

25. With respect to print media, while it may be true that daily newspapers usually have a specific political viewpoint, most newspapers also have a policy that such viewpoint stays on the editorial page and away from the newsroom. Moreover, just like cable television systems, most daily newspapers publish on their opinions pages a *variety* of viewpoints from syndicated columnists, including viewpoints completely at odds with the political viewpoint of the publisher or editorial staff.

³³ The Arbitron 12+ AQH Audience Share for WRVZ increased from 2.3% to 8.1%. In terms of actual listeners, WRVZ total listenership increased from 14,000 to 33,900. SOURCE: The Arbitron Company, Spring, 2000, Charleston, WV Metro. (Copyright © The Arbitron Company, 2000).

26. According to the Commission, there are approximately fifty-four newspaper-broadcast combinations currently operating. There is little, if any, evidence that such combinations either before or after the adoption of the NBCO rules, have presented a monolithic viewpoint on any or all issues of public importance.³⁴ In fact, from the outset, the record has shown the contrary. In adopting the NBCO rules, the Commission acknowledged that newspaper publishers brought a pioneering spirit to broadcasting, first in radio, and then in television, that served the public interest.³⁵ The rules were adopted *not* with a view toward stopping abuses, but rather to promote diversity of viewpoints in broadcasting at a time when the number of independently-owned facilities was much more limited than today.³⁶ Moreover, the Commission had wearied of dealing with the diversity issue on a case-by-case basis, and longed for the security found in a *structural* definition, *i.e.*, a “black-letter” rule.³⁷ Relying on an arbitrary rule lacking

³⁴ As noted above, in WVRC’s case, the daily newspaper and the broadcast day-to-day operations are run completely separate. *See*, ¶7, *supra*.

³⁵ *Second Report and Order*, 32 RR 2d 954 (1975), ¶100.

³⁶ *Id.*

³⁷ Commissioner Robinson was at least honest in admitting that this desire stemmed from his belief

any foundation to replace *ad hoc* critical analysis of a particular case, however, is a dereliction of a federal agency's statutory duty to regulate in the public interest.³⁸

that *ad hoc* decisions were not susceptible to clear, objective criteria that could be consistently applied. *Id.*. Statement of Commissioner Glen O. Robinson, Concurring in Part and Dissenting in Part, 32 RR 2d 954, 1013.

³⁸ It has been argued that the provision for "waivers" cited by the Supreme Court in upholding the NBCO rules, saves them from being deemed unreasonable, arbitrary and capricious. *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978). But the Commission's willingness to waive the rule only four times in the last 25 years undermines any such conclusion. See, *WAIT Radio v. FCC*, 418 F2d 1153, 16 RR 2d 2107 (DC Cir, 1969) (*That an agency may discharge its responsibilities by promulgating rules of general applications which, in the overall perspective establish the "public interest" for a broad range of situations, does not relieve it of an obligation to seek out the "public interest" in particular cases.... Provision for waiver may have a pivotal importance in sustaining the system of administration by general rule.*)

27. Even at the time of adoption of the NBCO rules, the record established that newspaper-owned broadcast licensees programmed more news and information than similarly-situated independent licensees. Statistical evidence collected by the Staff during the initial rule making proceeding on NBCO established that newspaper-owned stations actually produced a larger percentage of news, public affairs, and other public service programming than did independently owned stations.³⁹ Despite the fact that the Commission's own Staff had compiled this data, the Commission chose to downplay the significance of this public interest factor or ignore it altogether.

28. To reiterate what should be obvious, there is a plethora of media viewpoints available in every market, and since a "cross-interest" policy is here under review, consideration of the availability of mass media *other than* broadcast stations in a market cannot be arbitrarily excluded or ignored on the theory that alternate media voices in the marketplace are "nonequivalent."

³⁹ See, e.g., *Second Report and Order*, 32 RR 2d 954 (1975), Appendix C, *Staff Study of 1973 Television Station Annual Programming Reports*: "The conclusion is that television stations under joint ownership with a co-located newspaper quantitatively perform at least as well as other stations in the areas covered by this study; however these jointly owned stations broadcast significantly more minutes than other stations in several categories of local programming [news, public affairs'], other important factors being equal." 32 RR 2d at 1035; see also ¶¶62-65 of the same Report and Order.

B. Newer Rationales Concerned With “Market Competition” Do Not Support Retention of the NBCO Rules.

29. Some have suggested that even if the original rationale of promoting diversity of media ownership and viewpoint in the broadcast industry no longer exists as justification for retention of the NBCO rules, an alternative rationale for retention may now be found in the concern over “control” of advertising rates in the local media market by one or two consolidated owners.⁴⁰ In the instant proceeding the Commission has called for comments and information on the potential adverse economic effects a local newspaper-broadcast combination might have on market competition.⁴¹

1. Current Methods of Analysis Used by the Commission Are Overly Simplistic, Producing Flawed Results.

⁴⁰ *NPRM*, ¶¶19-24. Such a rationale is also cited by the Mass Media Bureau to support its current policy of “flagging” certain proposed radio assignments and transfers.

⁴¹ *Id.*

30. Currently, the Commission's rules and policies only consider broadcast, cable and general circulation daily newspapers as media that are considered for attribution purposes. However, when considering the level of market competition for advertising revenues, limiting the analysis only to these media creates a misleading picture of the degree of influence of daily newspapers as well as broadcast media. The statistics cited by the Commission⁴² create a distorted picture of the "product market." **Table 1** presents a list of media and their share of advertising revenues for calendar year 2000. Based upon preliminary data collected by the NAA and by Universal McCann (the same source cited by the Commission), there was a total of \$243.3 billion spent on advertising on all media in 2000 • an increase of over \$23 billion from the amount spent in 1999. When all significant advertising media sources are considered, the proportionate shares of daily newspapers, television, cable and radio of the total revenue pie are considerably *smaller*.

TABLE 1: U.S. ADVERTISING EXPENDITURES • ALL MEDIA

(SOURCE: NAA, *Facts About Newspapers*, 2001 Ed.; (newspapers), Universal McCann (all other media))

Advertising Medium	2000* (millions)	Percent of Total	1999† (millions)	Percent of Total
Daily Newspapers Total	\$48,670	20.0	\$ 46,289	20.9
National	7,653	3.1	6,732	3.0
Retail	21,409	8.8	20,907	9.4
Classified	19,608	8.1	18,650	8.4
Magazines	12,370	5.1	11,433	5.2
Broadcast Television	44,802	18.4	40,011	18.0
Cable Television	14,429	5.9	12,570	5.7
Radio	19,296	7.9	17,215	7.8
Direct Mail	44,591	18.3	41,403	18.7
Yellow Pages	13,228	5.4	12,652	5.7
Miscellaneous**	31,491	12.9	28,490	12.8
Business Papers	4,915	2.0	4,274	1.9
Outdoor Advertising	5,176	2.1	4,730	2.2

⁴² "[A]dvertisers spend about 45% of all local advertising dollars on newspapers, about 16% on radio stations, and about 15% on broadcast TV stations." *NPRM*, ¶21.

Internet	4,333	1.8	2,832	1.3
Total - National	148,522	61.0	132,544	59.7
Total - Local	94,778	39.0	89,405	40.3
Total - All Media	243,300	100.0	221,949	100.0

*Preliminary data

† = Revised data

** "Miscellaneous" includes weeklies, shoppers, pennysavers and cinema advertising.

Estimates include all costs: time and talent, space and production.

31. For example, daily newspapers share of advertising revenues in 2000 was only 20%, a decline of 0.9% from their share of 1999 total ad revenues. Newspapers' share of *national* advertising revenues was only 3.1% of the total. Moreover, as the Commission itself acknowledges, there are conflicting opinions as to whether the advertising market for newspapers can be readily substituted for the advertising market for radio and television.⁴³

⁴³ "We note that when the Commission adopted the newspaper/broadcast cross-ownership rule, it observed that the Department of Justice defined the relevant product market to include newspapers and broadcast stations. Currently, however, the Department of Justice views radio as a separate product market. Courts have likewise concluded that the local newspaper advertising market is a distinct antitrust market from the local media advertising markets. *NPRM* at ¶21 (*citations omitted*).

32. To illustrate the problem, fully forty percent (40%) of a daily newspapers ad revenues come from the sale of *classified advertising*, which the Commission acknowledges is “a type of advertising for which broadcast stations do not compete with newspapers.”⁴⁴ However, the Internet does appear to be competing with newspapers for national and well as local classified advertising. Most national product advertisers have a presence on the web. In addition, real estate firms, car dealerships, and employment agencies all engage in internet of advertising that is analogous to newspaper classifieds. Finally, the Internet has become one of the best sources of “miscellaneous for sale” classified advertising. The success of websites such as *E-Bay* attest to the utility and competitiveness of the Internet for the kind of advertising traditionally found only in daily or weekly newspapers. Thus, in evaluating a proposed newspaper-broadcast combination, the Commission must either ignore that portion of newspaper revenues garnered from classified advertising, or, if it is included, then other media which compete for classified advertising dollars, such as the Internet, and other, “miscellaneous” print media such as weeklies, shoppers and pennysavers.⁴⁵

33. With respect to retail advertising, newspapers tend to be more competitive with radio television and cable.⁴⁶ However, any study of how these media compete for retail advertising dollars must take into account the fact that the nature of the product being advertised in the mind of the advertiser or ad agency often determines the medium to employ for a particular advertising campaign. In short, contemporary media buys by advertising agencies and public

⁴⁴ *Id.* Revenues from classified advertising generated \$19.6 billion for daily newspapers, or 8.1% of all advertising dollars spent in 2000. This figure *exceeds* the total ad revenues received by radio from all sources for that year (\$19.3 billion). Apart from the occasional “swap shop” programs on radio, this entire source of advertising is not placed on broadcast media.

⁴⁵ These “Miscellaneous” media received ad revenues of \$31.5 billion in 2000 (12.9% of total advertising expenditures), most of which would be categorized as “classified advertising.” See Table 1, *supra*.

⁴⁶ Cable television advertising revenues in 2000 amounted to \$14.4 billion (5.9%) of all advertising

relations firms are *media specific*, and the ad campaigns designed to take advantage of that particular medium. Advertising placements are not necessarily interchangeable as to media.

34. Further, as shown in TABLE 1, other media besides broadcasting, cable and daily newspapers compete for retail advertising dollars. In 2000, \$44.6 billion • almost as much as total daily newspaper ad revenues • was spent in *direct mail advertising* campaigns. Yellow pages advertising accounted for another \$13.2 billion (5.4%), and billboard-outdoor advertising another \$5 billion (2.1%).

dollars. See Table 1.

35. Any formula for determining “market concentration” as between newspapers and broadcast media would need to take into account other competing media for such revenues as well as provide for differences in the selection of media based upon the nature of the product or service being advertised. This in turn might depend to a significant extent on the demographics of a particular media market. It becomes clear that, *even if* the Commission could derive such a formula for evaluating market concentration, it would be completely unwieldy, overly complex, and impossible to administer fairly. “Go /No-Go” decisions of the Staff on proposed cross-media assignments and transfers based upon economic market competition analysis would constantly be subject to challenges both at the Commission level and in the Courts with resulting uncertainty, if not complete chaos, in the industry.⁴⁷

2. *The Data Supporting Market Concentration Analyses is Unreliable.*

36. Apart from the unworkability of market concentration analysis as between diverse media, the economic data on which such analyses rest are unreliable, especially as to certain media. Unless a media company is publicly held, the securing of any kind of financial data such as revenues from advertising sales relies on self-reporting and estimates of competitors revenues by competing media. WVRC has first hand experience with the potential unreliability of such data.

⁴⁷ It does not follow, however, that an arbitrary, “bright line” rule, even if it could pass constitutional muster, is the only alternative.

37. WVRC's affiliate, West Virginia Radio Corporation of Charleston recently acquired Radio Station WRVZ (FM), Pocatalico, West Virginia. Commission approval of the proposed acquisition⁴⁸ was delayed pending "review" by Mass Media Bureau staff of the potential market concentration presented by such an acquisition. In flagging the proposed assignment,⁴⁹ the Staff considered radio market revenue data for the Charleston, WV MSA as compiled by BIA, Financial for 1999. BIA's estimates of WVRC's 1999 revenues in the Charleston, WV Market were off by over \$2 Million, representing, in this case a 33-_% exaggeration.

38. As noted above, excepting the financial reports published by publicly-held companies, there is no "official" source where actual figures, based upon, *e.g.*, tax returns or audited statements, are the basis for market revenue estimates. A licensee surveyed may decline to disclose its earnings to a private entity such as BIA, or may report erroneously.⁵⁰ Because many broadcasters refuse to participate in BIA's revenue survey, BIA often compiles its data not only on self-reported income, but upon a broadcaster's estimates of its *competitors* revenues.⁵¹

⁴⁸ BALH-20000530ACG.

⁴⁹ The Commission's public notice of special consideration of the WRVZ application stated:

NOTE: BASED ON OUR INITIAL ANALYSIS OF THIS APPLICATION AND OTHER PUBLICLY AVAILABLE INFORMATION, INCLUDING ADVERTISING REVENUE SHARE DATA FROM THE BIA DATABASE, THE COMMISSION INTENDS TO CONDUCT ADDITIONAL ANALYSIS OF THE OWNERSHIP CONCENTRATION IN THE RELEVANT MARKET. THIS ANALYSIS IS UNDERTAKEN PURSUANT TO THE COMMISSION'S OBLIGATION UNDER SECTION 310 (d) OF THE COMMUNICATIONS ACT, 47 U.S.C. SECTION 310 (d), TO GRANT AN APPLICATION TO TRANSFER OR ASSIGN A BROADCAST LICENSE OR PERMIT ONLY IF SO DOING SERVES THE PUBLIC INTEREST, CONVENIENCE AND NECESSITY. WE REQUEST THAT ANYONE INTERESTED IN FILING A RESPONSE TO THIS NOTICE SPECIFICALLY ADDRESS THE ISSUE OF CONCENTRATION AND ITS EFFECT ON COMPETITION AND DIVERSITY IN THE BROADCAST MARKETS AT ISSUE AND SERVE THE RESPONSE ON THE PARTIES. *Public Notice*, Report No. 24755, released June 14, 2000, page 2.

⁵⁰ BIA has acknowledged the possibility for lack of accuracy, but says such uncertainty is accommodated by referring to a "confidence factor" of from one to three, with three being the most confident. BIA's "Confidence Factor" for Charleston is not known.

⁵¹ Apparently, BIA believes that by averaging these competitor estimates it can arrive at a reasonable approximation of a non-reporting station's or group's actual revenues.

39. While WVRC readily admits that the financial data for the broadcast industry compiled and prepared by BIA or other private source can provide useful information for a variety of purposes, WVRC believes that, given the built-in potential for significant unreliability,⁵² its utilization by a government agency in promulgating public policy or in applying a theoretical “public interest” standard to specific cases, is unreasonable and unsound.

3. *Other Agencies Are Better Suited to Investigate and Adjudicate Market Concentration Issues.*

40. Even if examples of harm to the public in the form of artificially elevating the rates charged for advertising could be documented, other federal agencies are much better suited to deal with such matters.

⁵² WVRC respectfully submits that overestimating broadcast revenues of a radio station group by over \$2 million or 33-_% , is a *significant* miscalculation.

41. Market concentration and anti-competitive issues are within the purview of both the Federal Trade Commission and the Antitrust Division of the U.S. Department of Justice. Detailed federal legislation and regulations under the umbrella of *Hart-Scott-Rodino*⁵³ have been enacted to regulate acquisitions and mergers of all forms of business, not just electronic media. Moreover, even though a proposed consolidation, because of its size, does not trigger the pre-merger filing requirements under *Hart-Scott-Rodino*, the Justice Department can, nevertheless, launch its own inquiry into the proposed merger and can order the parties to defer completing the merger until after its investigation has been completed.⁵⁴

42. In an era of evaporating budget surpluses, it makes no sense to have multiple agencies of the federal government engaged in the same or similar activity, even to the point of reviewing the same proposed transactions. It is a waste of taxpayer's money for the FCC to duplicate the activity of other federal agencies, and such activity also opens the FCC to criticism that it is acting outside the scope of its Charter by the affected industry, government watchdogs and members of Congress alike.

43. As a practical matter, even if antitrust inquiries were within the statutory purview of the FCC, the Commission lacks both the manpower and expertise to conduct extensive market concentration investigations of proposed broadcast mergers. Attempting to play this role has led to numerous applications being held hostage to an amorphous inquiry with no clear rules defining how such situations should be resolved, and no real authority to take any action other than grant or setting for hearing.⁵⁵

⁵³ *Hart-Scott-Rodino Antitrust Improvements Act of 1976*, Pub. L. 94-435, 90 Stat. 1383 (Sept. 30, 1976), codified as 15 U.S.C. §18a; *see also* accompanying FTC regulations in Title 16 C.F.R. §§801-803.

⁵⁴ Moreover, individuals of groups believing that an unfair trade practice has taken place can also refer the matter to the Attorney General's Office of their respective State.

⁵⁵ WVRC acknowledges that the Commission recently released a new *Notice of Proposed Rule*

Making, wherein it proposed to examine issues arising out of radio market consolidations and whether current methodologies are adequate to ensure that the public interest is served. “In the Matter of Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets,” FCC 01-329 (MM Docket Nos. 01-317, 00-244), released November 9, 2001. There is no assurance, however, that, given the difficulties in assembling reliable information, a workable methodology of examining media market competition in the context envisioned by the Commission in MM Docket 01-317 can ever be accomplished. More important, however, is the question of whether the Commission has the authority to modify its local radio ownership rules in light of the very precise language of Section 202(b) of the Telecommunications Act of 1996.

C. Continued Enforcement of the NBCO Rules is Counterproductive.

44. From the above analysis, it may be concluded that continued enforcement of the NBCO Policy is counterproductive to the stated goals of “diversity.” The print media has taken a disturbing downturn since the adoption of the Policy. In an attempt to keep daily newspapers viable, Congress enacted the *Newspaper Preservation Act*.⁵⁶ The Act exempted newspaper joint operating agreements from the application of the federal antitrust laws, if, at the time of the arrangement, not more than one of the newspaper publications involved in the performance of such an arrangement was likely to remain or become a financially sound publication.⁵⁷

⁵⁶ P. L. 91-353, 15 U.S.C. §1801.

⁵⁷ See 15 U.S.C. §§1801-1803. At present, there are twelve (12) Joint Operating Agreements created under the auspices of the Act, between daily newspapers in the following communities: Albuquerque, NM, Birmingham, AL, Charleston, WV, Cincinnati, OH, Denver, CO, Detroit, MI, Fort Wayne, IN, Las Vegas, NV, Salt Lake City, UT, Seattle, WA, Tucson, AZ, and York, PA. SOURCE: NAA, Facts About Newspapers, 2001 Ed., p. 30.

45. Continued enforcement of the NBCO Policy is thus in conflict not only with the Commission's policy of diversity but the public policy expressed by Congress in the implementation of the Newspaper Preservation Act as well.⁵⁸ WVRC respectfully submits that continued enforcement of a policy which tends to reduce diversity and effective competition is directly and fundamentally contrary to the public interest.

46. Continued enforcement of the NBCO Policy could also adversely affect broadcast program service. As noted above, in the *Second Report and Order* adopting the NBCO Policy, the Commission acknowledged that stability of the industry and continuity of ownership served important public interest purposes because they encouraged commitment to program quality and service.⁵⁹ That co-located newspaper-broadcast combinations had provided "undramatic but nonetheless statistically significant superior" program service in a number of program particulars was too clear in the record to be denied by the Commission.⁶⁰

47. The Commission has also recognized in other contexts that the amount of available capital has a significant relationship to the quality of program service provided. Although one might argue that the acquisition of a troubled newspaper by a broadcast licensee (or *vice versa*) would necessarily diminish the capital available to the broadcaster, the opposite is true. Greater economies of scale through a greater revenue base and considerations of space, consolidation,

⁵⁸ That Congress apparently acted inconsistently with the Act, by prohibiting in its 1987 appropriations bill the FCC from conducting any rule making proceedings to repeal the NBCO rules, is explained by the political motivations of certain Congressional leaders at the time. As found by the U.S. Court of Appeals (which overturned a portion of that legislation) debate on the floor clearly indicated that the legislation was directed at a single individual, Rupert Murdoch, principal owner of Fox Broadcasting and NewsAmerica Publishing, Inc. which published daily newspapers in both Boston and New York, and which newspapers at times had been extremely critical of certain U.S. Senators. Based upon the remarks of some Senators during the debate, it was clear that the rider was *retaliatory* in nature, and an attempt to suppress free speech. *See, NewsAmerica Publishing, Inc. v. FCC*, 844 F.2d 800 (D.C. Cir. 1988).

⁵⁹ *See, Second Report and Order*, 50 FCC 2d 1046, 32 RR 2d 954, 1032 (1975).

⁶⁰ *Id.*

and accounting would yield additional financial resources made available for both programming and newspaper circulation without jeopardizing editorial independence. Accordingly the elimination of the NBCO rules would serve to enhance broadcast service and have the added public interest benefit of providing additional economic stability to the print media.⁶¹

D. Continued Enforcement of the NBCO Rules is a Violation of the First Amendment.

48. Given the absence of a need to promote further diversity or to constrain anti-competitive practices, there can be no justification for continuing the enforcement of the NBCO rules. Without a compelling governmental interest, narrowly tailored, the rules constitute a violation of the First Amendment to the Constitution of the United States.

49. Eliminating the stringent ownership rules would allow broadcasters to compete more effectively with other media, thereby ensuring quality and diversity in programming for the public. The NBCO Rules not only stifle productivity, but also infringe upon broadcasters' First Amendment rights: broadcasters are prevented from freely selecting the media to present their programming to the public, and are also denied the ability to bargain for better programming.

The structural limitations placed on broadcasters thus eliminate from particular markets and the public major providers of information.

⁶¹ Even at the time of adoption of the *Second Report and Order*, the record seemed to suggest that in many cases the revenue stream from the *broadcasting* arm of the newspaper-broadcast combination was being used to subsidize the *newspaper* side, not the other way around. *See, Second Report and Order, supra*, Statement of Commissioner Glen O. Robinson, Concurring in Part and Dissenting in Part, 32 RR 2d 954, at 1026. The continuing decline in the number of daily newspapers in this country suggests that it is even more true today.

50. To be constitutional, governmental regulations which favor certain classes of speakers over others must be supported with a compelling state interest.⁶² In *Turner Broadcasting Systems, Inc. v. FCC*, 512 U.S. 622, 114 S. Ct. 2445, 2468, 75 RR 2d 609 (1994) (“Turner I”), the Court reaffirmed that “[r]egulations that discriminate among media, or among different speakers within a single medium, often present serious First Amendment concerns.” Regulation which restricts the speech of some elements of society in order to enhance the relative voice of others is presumed invalid. *Buckley v. Valeo*, 424 U.S. 1 (1976). Such discrimination constitutes an indication that the rule's purpose is to regulate the message provided by certain speakers, and is highly suspect. The fact that the restrictions may operate against only a small group of speakers is irrelevant.⁶³ The scarcity and diversity rationales do not adequately justify such rules in light of the enormous amount of programming and information available to consumers.

51. It may be argued that the NBCO rules do not, in and of themselves, impinge on freedom of expression because they are *structural*, rather than content-oriented. This distinction has consistently been rejected by the Courts. *Turner Broadcasting Systems, Inc. v. FCC* (Turner I), *supra*; see also, *Turner Broadcasting System, Inc. v. Federal Communications Commission*, 520 U.S. 180, 189 (1997) (“Turner II”). Most recently in *Time-Warner Entertainment v. FCC*, 240 F3d 1126 (D.C. Cir. 2001) (“Time Warner”), the D.C. Circuit held that the horizontal (number of subscribers) and vertical (number of channels in which MSO has an attributable interest) caps imposed by the Commission on cable operators, although not facially invalid, were nevertheless significant burdens on speech.⁶⁴ The structural limitations

⁶² *Home Box Office*, 567 F.2d at 47-48 (D.C. Cir. 1977).

⁶³ *C&P Telephone*, 76 RR 2d at 995.

⁶⁴ *Id.*, 240 F3d 1126 at ____, (D.C. Cir. 2001).

on newspaper-broadcast cross ownership are certainly as great, if not greater a burden on a newspaper publisher's or broadcaster's freedom of expression.

52. From a First Amendment perspective, broadcasting can hardly be considered unique when compared to other mass media information sources. The First Amendment would be better served by placing broadcasters on equal footing with other information providers. In short, “[T]he public interest in diverse . . . options is best served by deferring to the marketplace.”⁶⁵

⁶⁵ *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434 (1985).

53. Moreover, it has long been held that regulations that impose First Amendment burdens on speech must be closely tailored to further an important government interest.⁶⁶ If diversity is the interest served by the ownership rules, then the regulations are overinclusive. One has only to look at the diversity of programming and sources in most major markets to realize that these concerns are overstated.

54. For the reasons advanced above, the continued enforcement of the NBCO rules no longer serves the public interest and raise serious questions of consistency with First Amendment principles. It is clear that, absent a sufficiently important and continuing compelling governmental interest, regulations which either directly abridge freedom of expression or, by their application restrict such expression, are constitutionally suspect. *United States v. O'Brien, supra.*

⁶⁶ *United States v. O'Brien, supra*, 391 U.S. at 377 (1968). The *O'Brien* test was applied to the Commission's cable horizontal and vertical caps by the D.C. Circuit Court to cable in *Time Warner, supra*, note 64.

55. There can be no dispute over whether NBCO restrictions impinge upon the broadcaster's First Amendment rights. Although the policy professes to be content neutral, restricting only common ownership of broadcast facilities and daily newspapers in the same market, and not the content of their expression, those regulations discriminate among speakers in the mass media market, based on the nature of the medium used for speech, and are thus highly suspect. It necessarily follows that restrictions on ownership impinge directly on freedom of expression by determining who may speak and who may not. The rules dictate where and in what manner a broadcaster may exercise its freedom of expression. Such restrictions cannot withstand even *intermediate* Constitutional scrutiny. *Time-Warner Entertainment v. FCC*, 240 F3d 1126 (D.C. Cir. 2001).⁶⁷ Moreover, given the current availability of programming and other information sources, it cannot be concluded that the present multiple ownership rules are sufficiently narrowly tailored to meet the standards set forth in *United States v. O'Brien*, *supra*. Certain broadcasters are denied the right to acquire additional broadcast licenses solely because the government is trying to promote goals that have already been achieved • diversity of opinion and marketplace competition.

56. A government regulation which restricts or otherwise has an adverse impact on an individual's or group's freedom of expression is justified only to the extent that (a) it furthers an

⁶⁷ See also, *Buckley v. Valeo*, *supra*, 424 U.S. 1 (1974), wherein the Court held that forced choices in the Federal Election Campaign Act which limited expenditures of individuals or groups supporting a candidate were held to be an unconstitutional abridgment of freedom of speech. In striking down that part of the legislation, the Court rejected the notion that Government, under the Constitution, could act to equalize the relative ability of individuals and groups to influence the outcome of elections. Rather, “the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment...” 424 U.S., at 48-49.

important or substantial governmental interest (*i.e.*, one that addresses an evil that the government has the right to prevent), (b) is unrelated to the suppression of content of speech, and (c) the incidental restriction upon freedom of expression caused by enforcement of the regulation is no greater than necessary to achieve that interest. *United States v. O'Brien, supra*.

57. As noted above, the primary reason the FCC cited for adopted the NBCO rules was to further the policy of promoting diversity of viewpoints in media markets. This, in turn was based upon the scarcity rationale, and the need to ensure that all markets were provided with a sufficient diversity of viewpoints. It has been observed that scarcity is no longer an appropriate basis for limiting a broadcaster's First Amendment rights.⁶⁸ Even assuming that scarcity should serve as a standard for government oversight, it is well established that the scarcity rationale no longer exists. The Commission has, on numerous occasions, emphasized that there is a sufficient increase in the number and diversity of program outlets to warrant a variety of deregulatory actions.⁶⁹ Except for a handful of the smallest markets where antitrust considerations *may* warrant some scrutiny of media ownership, such diversity guarantees an absence of

⁶⁸ In *Telecommunications Research and Action Center v. FCC*, 801 F.2d 501, 61 RR 2d, 330, *reh. denied*, 806 F.2d 1115 (D.C. Cir. 1986), *cert. denied*, 482 U.S. 919 (1987), the court noted that use of the scarcity rationale as an analytic tool in connection with new technologies inevitably leads to strained reasoning and artificial results.

"It is certainly true that broadcast frequencies are scarce but it is unclear why that fact justifies content regulation of broadcasting in a way that would be intolerable if applied to the editorial process of the print media. All economic goods are scarce . . . Since scarcity is a universal fact, it can hardly explain regulation in one context and not another. The attempt to use a universal fact as a distinguishing principle necessarily leads to analytical confusion." (*footnotes omitted*)

61 RR 2d at 337.

⁶⁹ See, *e.g.*, *Multiple Ownership of AM, FM and Television Broadcast Stations*, 100 FCC 2d 17 (1984), *recon.*, 100 FCC 2d 74 (1985) (revising the seven-station rule to permit ownership of up to twelve stations); *Fairness Doctrine Alternatives*, 2 FCC Rcd 5272 (1987), *recon.*, 3 FCC Rcd 2035 (1988), *aff'd. Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1989) (eliminating the fairness doctrine as unnecessary because of the diversity of voices and opinion in broadcast and other media).

monopolization of the means of expression in a given media market. Whatever validity the current NBCO rules may once have had, it no longer exists.

58. Where the underlying public interest consideration for a regulation is no longer valid, the rule cannot withstand constitutional scrutiny. *See Geller v. FCC*, 610 F.2d 973, 980 (D.C. Cir. 1979) (“Even a statute depending for its validity upon a premise extant at the time of enactment may become invalid if subsequently that predicate disappears.”); *Home Box Office v. FCC*, 567 F.2d 9, 36 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 829 (1977) (“[R]egulation perfectly reasonable and appropriate in the face of a given problem may be highly capricious if that problem does not exist.” [citations omitted]). Accordingly, the Commission’s rules that presently restrict common ownership of daily newspapers and commercial broadcast stations in the same market must be eliminated.

III. THE NBCO RULES, IF RETAINED, SHOULD IMPOSE THE LEAST POSSIBLE BURDEN ON FREEDOM OF EXPRESSION.

59. In the event that the Commission decides that the NBCO Rules should be retained in some form, WVRC urges that the rules be modified so as to present the least possible burden on speech to further its interest in limiting undue concentration control of the media of mass communication. While WVRC reiterates that there is no longer a need for *any* governmental restriction on newspaper-broadcast cross-ownership, it would offer the following comments to guide the Commission in more narrowly tailoring the rules.

A. Restrictions Against Local Newspaper-Radio Combinations Must be Eliminated.

60. There can be no justification, in today’s media marketplace, for retention of the NBCO rules as applied to Radio. As noted above, there are over 13,000 radio stations on the

air as of September 30, 2001,⁷⁰ double the number on the air in 1975 • whereas the number of daily newspapers has continued to decline.⁷¹ Even allowing for the radio ownership consolidation that has occurred under pursuant to the *Telecommunications Act of 1996*, there remain a surfeit of independent radio “voices” compared to the few remaining independent publishers.⁷²

61. Even more telling is the admission contained in the original 1975 policy statement that *radio* voices, as sources of local and regional news are *insignificant* when compared to either newspapers or television:

Realistically, a radio station cannot be considered the equal of either the paper or the television station in any sense, least of all in terms of being a source for news or for being the medium turned to for discussion of matters of local concern. . . . Weekly newspapers, likewise, have too small an impact in comparison to the daily newspaper-television station combination to provide a basis for an exception.⁷³

⁷⁰ See Paragraph 17, *supra*, and accompanying notes.

⁷¹ If any single statement contained in the Commission’s 1975 *Second Report and Order* demonstrates how outdated and irrelevant the NBCO policy has become it is the following:

“The state of FM has indeed improved over the years, but much has been due to the pioneering efforts of AM licensees who were encouraged by us to enter the FM market. More than this, it is by no means clear that FM stations can yet be expected to stand on their own.”

Second Report and Order, supra, 50 FCC 2d 1046, 32 RR 2d 954, 963 (¶31).

⁷² There is also significant consolidation in the daily newspaper industry, which the Commission has failed to address while discussing radio consolidation. Not only has the number of independent owners of daily newspapers declined nationally, over the past 25 years a number of two-newspaper cities became one-newspaper cities by virtue of one newspaper acquiring the other. See, *Broadcasting and Cable Yearbook 2001*, pp A80-A88.

⁷³ *Second Report and Order, supra*, 50 FCC 2d 1046, 32 RR 2d 954, 993 (¶115).

Yet, the Commission voted to apply the cross-ownership rules to radio as well as television solely with the justification of “the more diversity the better.” Rational public policy cannot be based upon such simplistic “more is better” nonsense. In the past twenty years we have seen first-hand that such a rationale can cause tremendous economic hardship on an industry already faced with competition from a multitude of other media not subject to the same rules.⁷⁴ Given the current decline in the economy, with some broadcast media and daily newspapers already suffering, it is absolutely wrong-headed for the Commission to retain on the books a policy that is injurious to the economic health of the nation’s radio broadcast industry, and counterproductive of the very goal the Commission seeks. WVRC strenuously urges the Commission to learn from past mistakes in public policy and not to start the cycle again.

B. Restrictions on Newspaper-Broadcast Cross Ownership Should Become the Exception, Rather Than the Rule.

⁷⁴ The Commission’s diversity-generating policies of the 1980’s, typified by MM Docket 80-90 and its progeny, led to the economic crisis of commercial radio broadcasting in the early 1990’s. At a speech to the NAB in July, Acting Chairman James Quello told broadcasters that he was considering imposing a freeze on the allotment of any more FM channels. “I think in the name of diversity and competition we’ve licensed too many radio stations...” “I never thought I’d live to see the day when 60% of radio stations are losing money.” The point was raised again by Acting Chairman Quello in a speech to the New York State Broadcasters Association in late July, 1993, where he said, “I don’t see where the public interest would be served by allowing other people to go bankrupt.” BROADCASTING AND CABLE MAGAZINE, p. 14 (Aug. 2, 1993). Ultimately, the problem was addressed by Congress in the Telecommunications Act of 1996, permitting a significant amount of radio consolidation in a local market in order to give economic stability to the industry.

62. Although unlikely today, given the explosion of alternative media, there *may* exist a small number of media markets where a daily newspaper-broadcast combination might reasonably be deemed to result in undue concentration of control. WVRC believes such a situation demands that the tail should not wag the dog. The general rule should be that there is no restriction against common ownership of a daily newspaper and a broadcast station. Exceptional “egregious” cases could *and should* be resolved by *ad hoc* adjudication⁷⁵ rather than by a structural rule. However, in the event that the Commission conclude that some sort of “bright-line” rule should be adopted, WVRC would recommend that the Commission limit the application of the NBCO rules to prevent newspaper-broadcast cross-ownership combinations only in those markets where less than two (2) *other* independently-owned mass media sources would continue to exist following the acquisition or merger. Based upon the Commission’s own prior analysis,⁷⁶ such a restriction would prevent a single media entity from dominating the market.⁷⁷

63. WVRC acknowledges that few, if any markets would have so few outlets, which is simply to acknowledge that the goal of diversity of voices has already been met. To restrain the broadcast media, while other electronic and print media have no such restrictions, is to warp the playing field, giving a competitive advantage to those media. It is time to level that playing

⁷⁵ As argued above, the FTC and the U.S. Department of Justice are better suited to make such adjudications. The FCC has no particular expertise in the area of assessing multi-media competition, and its view of a market may, in fact, be myopic.

⁷⁶ See, e.g., *Shareholders of Citicasters, Inc.*, Memorandum Opinion and Order, 11 FCC Rcd 19135, 19141-43 (¶¶ 12-16) (1996); *Great Empire Broadcasting, Inc.*, Memorandum Opinion and Order, 14 FCC Rcd 11145, 11148 (¶ 10) (1999); *Shareholders of AMFM, Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 16062, 16066 (¶¶ 7-8) & n.10 (2000).

⁷⁷ This would be more restrictive than the case now in small radio markets where, under §73.3555(a), a single entity may own up to 50% of the other radio stations in the market even if only one other entity owned the other 50%. However, since we are dealing here with not just radio stations, but other mass media as well, it is unlikely that any community in the United States has access only to two separately-owned media “voices,” even if the Internet were to be excluded from consideration.

field, and to let the market decide which voices will prevail, both economically, and in the hearts and minds of the people.⁷⁸

C. The Commission's Current Standards for "Market Definition" and "Voice Count" Should be Modified.

⁷⁸ This is particularly true in the present context where no harm to the public interest has *ever* been demonstrated to exist as a result of a newspaper-broadcast combination. Instead, the Commission has justified its policy on an *imagined* proposition that a newspaper-broadcast combination would speak with one voice • despite all of the evidence going back to 1975 that such combinations historically have run their news and editorial departments completely separate from one another. *See, Second Report and Order, supra*, 32 RR 2d at 968-69 (¶45).

64. If the Commission decides to retain the NBCO rules but to adopt a more liberal waiver policy,⁷⁹ WVRC submits that some fundamental changes should be made in the current method of evaluating a proposed combination, both in the definition of what constitutes a “media market” and in counting the “voices.”

1. Market Definitions Should be Consistent.

65. The Commission’s current definition of the “market” for purposes of determining compliance with the NBCO rules is as follows:

(d) Daily Newspaper Cross-Ownership Rule. No license for an AM, FM or TV broadcast station shall be granted to any party (including all parties under common control) if such party directly or indirectly owns, operates or controls a daily newspaper and the grant of such license will result in:

(1) The predicted or measured 2 mV/m contour of an AM station, computed in accordance with §73.183 or §73.186, encompassing the entire community in which such newspaper is published; or

(2) The predicted 1 mV/m contour for an FM station, computed in accordance with §73.313, encompassing the entire community in which such newspaper is published; or

(3) The Grade A contour for a TV station, computed in accordance with §73.684, encompassing the entire community in which such newspaper is published.⁸⁰

⁷⁹ The Supreme Court upheld the NBCO rules partly because they observed that the Commission had stated it would use waivers to ameliorate what would otherwise be a harsh and unnecessary rule. *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775, 820, n.20 (1978). However, as admitted by the Commission, only four permanent waivers of the rules have ever been granted in the 25+ year history of the NBCO policy. *NPRM, supra*, ¶3. This is clearly not what the Supreme Court had contemplated.

⁸⁰ 47 CFR §73.3555(d).

66. Unlike the radio contour overlap rule,⁸¹ the NBCO rules utilize the *primary service contour* of a broadcast station, and not the city-grade, or “principal community contour.” The reasons are historical, rather than logical. The primary service contours⁸² were previously utilized by the Commission for all local ownership rules. However, in February of 1989, the Commission revised the radio duopoly rules to specify the *principal community contours* of 5 mV/m for AM and 3.16 mV/m for FM, rather than the primary service contours.⁸³ The Commission cited the increase of diversity and competition in the marketplace as well as listener habits as the reason for the relaxation of the radio duopoly rule.⁸⁴

67. For similar reasons, in the *Second Report and Order* of the same Docket, the Commission modified the radio-television cross-ownership (“One-to-a-Market”) rules to provide a more relaxed standard for waiver.⁸⁵ Despite the finding that audience listening habits had changed to the extent that most of a radio station’s listeners resided within the station’s principal community contour, the Commission did not apply the same reasoning to the NBCO rules (or the One-to-a-Market Rule). Given the adoption of a relaxed standard for waiver of the latter, the decision not to make the applicable signal strength contours in the One-to-a-Market Rule the same as those adopted for the radio duopoly rules was at least understandable. However, given the history of the current waiver policy for the NBCO rules, no such rationale applies. Accordingly, WVRC recommends that, in the event that the Commission elects to retain the NBCO rules in some form, it should take this occasion to apply similar contour definitions as are presently used in the Radio Contour Overlap Rule (§73.3555(a)).

⁸¹ 47 CFR §73.3555(a).

⁸² 1 - or 2 mV/m for AM, and 1 mV/m for FM.

⁸³ *Revision of Multiple Ownership Rules*, (MM Doc. 87-7), FCC 88-343, __ FCC Rcd ___, 54 FR 8335, 65 RR 2d 1676 (1989).

⁸⁴ *Id.*

2. *Other Media Must Be Included in any Calculation of
“Media Voices”*

⁸⁵ 2 FCC Rcd 1138, 65 RR 2d 1589 (1989).

68. The Radio Contour rule also differs from the NBCO rules in that no analysis of other “voices” in the market is considered. Presently, whether there are 65 additional voices or just one other media voice is irrelevant to a determination of whether a licensee is in compliance with the NBCO rules. WVRC submits that if the NBCO rule are to be retained, they must be modified to take into account whether, and to what extent, there are other media “voices” in the common areas served by the newspaper-broadcast combination. Moreover, such consideration cannot be limited to current definitions of mass media contained in the Rules.⁸⁶

69. *Broadcast Media.* WVRC’s own radio market, “Morgantown-Clarksburg-Fairmont, West Virginia,” is a case in point. The Morgantown-Clarksburg-Fairmont, WV Market is comprised of three counties in the MSA and nineteen (19) counties in three States in the TSA. TABLE 2 lists the MSA and TSA counties and their estimated populations aged 12 and older as of January 1, 2001.

**Table 2: Morgantown-Clarksburg-Fairmont, WV (#193)
Population Estimates by County⁸⁷**

COUNTY	ST	12+	COUNTY	ST	12+
Harrison*	WV	59,600	Preston	WV	24,800
Marion*	WV	47,600	Randolph	WV	24,300
Monongalia*	WV	66,600	Ritchie	WV	8,900
Garrett	MD	24,300	Taylor	WV	12,800
Greene	PA	35,300	Tucker	WV	6,500
Barbour	WV	13,500	Tyler	WV	8,200
Braxton	WV	11,000	Upshur	WV	19,800
Doddridge	WV	6,300	Webster	WV	8,400
Gilmer	WV	6,100	Wetzel	WV	15,100
Lewis	WV	14,900			

⁸⁶ The Commission currently considers only radio, television, cable TV and daily newspapers as other mass media that are attributable in the context of its multiple ownership rules. See, 47 CFR §73.3555.

⁸⁷ SOURCE: *Condensed Radio Market Report for Morgantown-Clarksburg-Fairmont, WV*, Spring, 2001. Copyright © Arbitron, Inc. 2001.

			Total 12+ Population:		414,000
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* = Metro (MSA) County.

70. Arbitron lists seventeen (17) AM and FM radio stations inside the three-county *Metro* (MSA) area and three additional stations outside the Metro with significant listenership.⁸⁸ However, there are at least 54 licensed radio stations⁸⁹ in the TSA,⁹⁰ and Arbitron lists a number of “Out of Market” (MSA or TSA) radio stations that received “diary mentions” in listener diaries for the Spring, 2001 Book.⁹¹ **Appendix I**, attached to these Comments, lists a total seventy-six (76) MSA, TSA or “listened to” out-of-market radio stations for this market.

71. Moreover, two counties in the Morgantown-Clarksburg-Fairmont ARB (Monongalia and Preston) are part of the *Pittsburgh Television DMA* (No. 20), which has 15 television stations.⁹² Other TSA counties to the West are part of the separate Clarksburg-Weston DMA (No. 165), which has three television stations. *Id.*, at B-175.

72. *Daily Newspapers.* Unlike many ARB markets having a total 12+ population of 400,000, the Morgantown-Clarksburg-Fairmont Radio Market MSA is served by *four (4)*

⁸⁸ Five of the 20 stations listed in the Spring, 2001 Report for Market #193 are owned by WVRC or its affiliates: WAJR (AM), Morgantown, WAJR-FM, Salem, WFBY (FM), Clarksburg, WVAQ (FM), Morgantown, and WSSN (FM), Weston (out of market). The combined AQH share of these five stations for persons aged 12 and older Monday through Sunday, 6:00 A.M. to Midnight, was 33.0. Arbitron REPORT, *supra* Note 87.

⁸⁹ NonCommercial, Educational (NCE) Stations are included in this count. Although they do not *directly* compete with commercial stations for advertising revenues, they are separate media “voices” that do compete for listeners within the TSA.

⁹⁰ See attached to these Comments.

⁹¹ “Mentions” in this context means that a station was listened to for a minimum of five minutes during a daypart during the survey, as shown in returned diaries for the market. A station may have a “cume share” that is less than 0.1 percent, in which case, it is not included in the AQH share rankings. APPENDIX I lists all commercial and noncommercial radio stations located within the TSA as well as any out-of-market station reported by Arbitron as receiving diary mentions.

⁹² SOURCE: 2001 BROADCASTING & CABLE YEARBOOK, p. B-219.

independently owned daily newspapers, three of them having significant readership within the market. These newspapers, and their total average paid circulations are:

- | | |
|--------------------------------------|----------------------|
| (1) the Morgantown DOMINION-POST | 19,513 ⁹³ |
| (2) the Clarksburg EXPONENT-TELEGRAM | 16,468 ⁹⁴ |

⁹³ SOURCE: Audit Bureau of Circulations, FAS-FAX Report -September 30, 2001. Morgantown is also served by the *Daily Athenaeum*, a daily newspaper having primary circulation (14,739) on the campus and environs of West Virginia University, which is located in Morgantown. SOURCE: West Virginia Press Services, Inc., WEST VIRGINIA NEWSPAPER DIRECTORY, 2001 (electronic edition).

⁹⁴ *Id.* The number is for “Combined Daily” (*i.e.*, morning and evening editions.)

- (3) the Fairmont TIMES-WEST VIRGINIAN 12,143⁹⁵
(4) the Charleston GAZETTE/DAILY MAIL 636⁹⁶

In addition, various counties in the TSA also have independently owned daily or weekly newspapers. In Randolph County, for example, the Elkins INTER-MOUNTAIN has a paid *daily* circulation of 11,060.⁹⁷

73. *Weekly Newspapers.* As the Commission has now acknowledged, the importance of *weekly* newspapers, as a source of local news and information for residents of a media market, is increasing.⁹⁸ There are weekly newspapers containing local news and information in each of the three cities listed above, as well as in many the other counties in the TSA. Table 3 lists the following communities served by weekly newspapers within the TSA:

TABLE 3: Weekly Newspapers Published in Morgantown-Clarksburg-Fairmont TSA⁹⁹

TSA County	Community	Name of Weekly	Paid Circulation
Barbour	Philippi	The Barbour <i>Democrat</i>	5,300
Braxton	Gassaway	The <i>MidState Star</i>	1,116
Braxton	Sutton	The Braxton <i>Citizen-News</i>	6,040
Braxton	Sutton	The Braxton <i>Democrat-Central</i>	5,151
Doddridge	West Union	The <i>Herald-Record</i>	2,809
Gilmer	Glenville	The Glenville <i>Democrat</i>	1,980
Gilmer	Glenville	The Glenville <i>Pathfinder</i>	1,600

⁹⁵ *Id.*

⁹⁶ SOURCE: Arbitron, Spring, 2001, *supra*, Note 87, at p. 9. The Audit Bureau of Circulations reports that the total combined daily circulation of the two newspapers (all counties) is 85,996. *Supra*, note 93. The Charleston GAZETTE and THE DAILY MAIL are separately owned daily newspapers which are operating under a Joint Operations Agreement. As required by the Newspaper Preservation Act (*supra*, Note 56 and accompanying text), the news and editorial staffs of the two papers are independent separate.

⁹⁷ SOURCE: Audit Bureau of Circulations, FAS-FAX Report, September 30, 2001. Weekly newspapers published within the TSA are shown in TABLE 3, *supra*.

⁹⁸ *NPRM, supra* at ¶10.

⁹⁹ SOURCE: West Virginia Press Services, Inc., 2001 WEST VIRGINIA NEWSPAPER DIRECTORY (*electronic edition*), pp. 15-21.

TSA County	Community	Name of Weekly	Paid Circulation
Garrett, MD	Piedmont/Westernport	The Piedmont <i>Herald</i>	1,582
Harrison	Bridgeport	The Bridgeport <i>News</i>	4,000
Harrison	Shinston	The Shinston <i>News and Harrison County Journal</i>	3,250
Lewis	Weston	The Weston <i>Democrat</i>	7,907
Preston	Terra Alta	The Preston County <i>News</i>	3,887
Preston	Kingwood	The Preston County <i>Journal</i>	5,146
Ritchie	Harrisville	The Ritchie <i>Gazette</i>	3,509
Ritchie	Harrisville	The Pennsboro <i>News</i>	4,658
Taylor	Grafton	The Mountain <i>Statesman</i>	2,983
Tucker	Parsons	Parsons <i>Advocate</i>	3,650
Tyler	Sisterville	The Tyler <i>Star News</i>	3,330
Upshur	Buckhannon	The <i>Record-Delta</i>	3,416
Webster	Webster Springs	The Webster <i>Republican</i>	986
Webster	Webster Springs	The Webster <i>Echo</i>	3,908
Wetzel	New Martinsville	Wetzel <i>Chronicle</i>	5,000
Total of Weekly Circulations:			81,208

74. In the face of the explosion of alternative sources for news and information now available to the consumer, it is patently arbitrary and capricious not to include such elements in analyzing a media market. In instituting this proceeding the Commission noted that the combined circulation of smaller, more targeted newspapers published weekly, has more than doubled, from approximately 35.9 million in 1975, to approximately 81.6 million in 1996. These weekly newspapers are often the source of local information.¹⁰⁰ And, as shown above, the best estimates are that currently, weekly news publications account for 12.9% of all advertising revenues • over \$31.4 billion. Moreover, although the Commission previously dismissed in its *Second Report and Order* other media such as weekly newspapers, yellow pages and direct mail advertising “because they are not meaningful sources of information on

¹⁰⁰ *NPRM*, *supra* at ¶10.

issues of local concern,”¹⁰¹ many of these sources do, in fact, provide news, information, and opinions on issues of local importance. Any redefinition of media market, for purposes of applying the NBCO rules, must take these sources into account.¹⁰²

75. *Other Print Media.* In addition to daily and weekly newspapers having general circulation in the Morgantown-Clarksburg-Fairmont, WV radio market, there are a number of periodical magazines that have significant readership in the area. Although national publications, these periodicals frequently have “region-specific” inserts involving regional or local issues, and often contain advertising that is local and paid for by cooperative arrangements.

76. Although information is not readily available on readership throughout the entire TSA, Arbitron has published readership statistics for the three *Metro* counties in the Morgantown-Clarksburg-Fairmont radio market. Periodicals containing news and information on national, regional and/or local issues having circulation of 1,000 or more in the Metro are listed in TABLE 4 below:

¹⁰¹ *NPRM, supra*, ¶44 Citing, *Local TV Ownership Report & Order*, 14 FCC Rcd at 12954, ¶114.

¹⁰² Direct mail advertising, for example, has become the primary means whereby candidates for local offices reach their prospective constituencies. Direct mail also remains an important vehicle for issue-oriented advertising as well as by candidates for regional and national office. Local governments communicate to residents within their jurisdictions frequently by direct mail circulars. A number of studies have demonstrated the effectiveness of demographically targeted direct mail advertising, and this marketing research is being carried over to the Internet. As these sources become more and more important vehicles of news and information on local issues, the Commission’s refusal to acknowledge them as independent “voices” becomes more and more unreasonable, arbitrary and capricious.

TABLE 4: SIGNIFICANT MAGAZINE CIRCULATION IN MSA

<i>Periodical</i>	<i>Circulation</i>	<i>%</i>	<i>Periodical</i>	<i>Circulation</i>	<i>%</i>
<i>Modern Maturity</i>	18,329	22.9	<i>U.S. News & WR</i>	1,861	2.3
<i>Reader's Digest</i>	9,605	12.0	<i>Outdoor Life</i>	1,847	2.3
<i>Time Magazine</i>	3,379	4.2	<i>Redbook</i>	1,842	2.3
<i>Prevention</i>	2,432	3.0	<i>Smithsonian Magazine</i>	1,327	1.7
<i>Playboy Magazine</i>	2,356	2.9	<i>Parents Magazine</i>	1,247	1.6
<i>Newsweek</i>	2,331	2.9	<i>Men's Health</i>	1,025	1.3
<i>Field & Stream</i>	2,252	2.8			
<i>National Inquirer</i>	1,981	2.5	Totals:	51,814	64.7

SOURCE: Arbitron Corporation, 2001; Audit Bureau of Circulations © 2000, 2001.

77. *Cable Television.* Numerous cable television systems operate within the greater Morgantown-Clarksburg-Fairmont, WV TSA. The National Cable Television Association lists West Virginia as having a total of 228 separate cable systems in operation with 642,550 homes passed and 497,431 basic subscribers (77.5%). Specific information regarding homes passed and basic subscribers for the TSA is not readily available. However, the Commission's Cable Database lists 270 separate Community Units operated by thirty-one (31) separate MSO's within the 17 West Virginia Counties that form the majority of the TSA.¹⁰³

78. *Other MVPD's.* As the Commission noted in the *NPRM* in this proceeding:

Other multichannel programming distributors (MVPDs), most notably direct broadcast satellite (DBS) providers, now compete in the marketplace but were nonexistent in 1975. DBS has grown rapidly, and now serves nearly 13 million subscribers, or over 15% of MVPD households. Other MVPDs serve another nearly 4 million subscribers. All of these MVPDs distribute the programming of many networks.¹⁰⁴

¹⁰³ SOURCE: FCC, Cable Bureau Registration Unit ID's. (Excel File). Greene County, PA and Garret County, MD are not included.

¹⁰⁴ *NPRM*, ¶11 (citing, *Seventh Annual Report*, 16 FCC Rcd at 6037, ¶ 61).

Because of difficult terrain in West Virginia, there are presently only a limited number of non-cable MMDS and similar MVPD operators in the Morgantown-Clarksburg-Fairmont, WV radio market. However, as noted above, West Virginia residents are able to receive DBS signals and DirecTV is listed locally throughout the market.

79. *The Internet.* TVRADIO WORLD¹⁰⁵ lists five television stations and 22 radio stations licensed in the Morgantown-Clarksburg-Fairmont Radio Market that have Internet websites. In addition there are web sites for other West Virginia radio and television stations in other WV markets: Bluefield-Beckley = 33; Charleston = 25; Huntington = 29.¹⁰⁶ Each of the daily newspapers in the Morgantown-Clarksburg-Fairmont Radio Market have a web presence, as well as the daily newspapers in Charleston and Huntington. There are a number of other internet sites devoted to providing news and information on the specific communities in the Morgantown-Clarksburg-Fairmont Radio Market, as well as West Virginia generally.

80. In short, WVRC's own market is teeming with media voices, many of which compete directly for advertising revenues as well as audiences. WVRC suggests that if the Commission undertook a study of every radio and television market in this country, similar results would be found. In today's media environment, it is no longer reasonable or justified for the Commission to exclude such alternative media sources from consideration in evaluating any existing or proposed newspaper-broadcast combination.

CONCLUSION

¹⁰⁵ www.tvradioworld.com/

¹⁰⁶ *Id.*, "West Virginia Radio / TV Stations on the Internet"

WHEREFORE, the above premises considered, WVRC respectfully urges the Commission, to amend its ownership rules by REPEALING Section 73.3555(d).¹⁰⁷ ALTERNATIVELY, the rules should be substantially relaxed to apply only to “egregious cases,” as that term has been previously defined in the Commission’s 1975 Policy Statement.

Respectfully submitted,

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December 3, 2001

¹⁰⁷ If the Commission decides that local newspaper-television combinations would constitute undue concentration, it should, nevertheless, repeal the rules as to newspaper-radio cross ownership. There can be no justification whatever for retention of that aspect of the NBCO rules.

**Appendix I. AM and FM Radio Stations Located or Heard
In Morgantown-Clarksburg-Fairmont, WV TSA**

	<i>Call Sign</i>	<i>Svc</i>	<i>Community of License</i>	<i>ARB</i>	<i>MSA/TSA</i>
1	WAJR	AM	Morgantown, WV	Y	MSA
2	WAJR-FM	FM	Salem, WV	Y	MSA
3	WBRB	FM	Buckhannon, WV	Y	MSA
4	WVUC	FM	Barrackville, WV	Y	MSA
5	WCLG	AM	Morgantown, WV	Y	MSA
6	WCLG-FM	FM	Morgantown, WV	Y	MSA
7	WDCI	FM	Bridgeport, WV	Y	MSA
8	WFBY	FM	Clarksburg, WV	Y	MSA
9	WGYE	FM	Mannington, WV	Y	MSA
10	WKKW	FM	Fairmont, WV	Y	MSA
11	WMMN	AM	Fairmont, WV	Y	MSA
12	WOBG	FM	Salem, WV	Y	MSA
13	WPDx	FM	Clarksburg, WV	Y	MSA
14	WRLF	FM	Fairmont, WV	Y	MSA
15	WVAQ	FM	Morgantown, WV	Y	MSA
16	WVHF	FM	Clarksburg, WV	Y	MSA
17	WZST	FM	Westover, WV	Y	MSA
18	WBTQ	FM	Buckhannon, WV	N	MSA
19	WBUC	AM	Buckhannon, WV	N	MSA
20	*WVPW	FM	Buckhannon, WV	N	MSA
21	*WVWC	FM	Buckhannon, WV	N	MSA
22	*WKJL	FM	Clarksburg, WV	N	MSA
23	WXKX	AM	Clarksburg, WV	N	MSA
24	WTCS	AM	Fairmont, WV	N	MSA
25	*WVPM	FM	Morgantown, WV	N	MSA
26	*WVVU	FM	Morgantown, WV	N	MSA
27	*WZWA	FM	Clarksburg, WV	N	MSA
28	WTBZ	AM	Grafton, WV	N	TSA
29	WTBZ-FM	FM	Grafton, WV	N	TSA
30	WDVE	FM	Pittsburgh, PA	Y	OM
31	WSSN	FM	Weston, WV	Y	TSA
32	WWSW	FM	Pittsburgh, WV	Y	OM
33	WFSP	AM	Kingwood, WV	N	TSA
34	WFSP-FM	FM	Kingwood, WV	N	TSA
35	WKMN	FM	Kingwood, WV	N	TSA
36	*WQAB	FM	Philippi, WV	N	TSA

	Call Sign	Svc	Community of License	ARB	MSA/TSA
37	WBHZ	FM	Elkins, WV	N	TSA
38	*WCDE	FM	Elkins, WV	N	TSA
39	WDNE	AM	Elkins, WV	N	TSA
40	WDNE-FM	FM	Elkins, WV	N	TSA
41	WELK	FM	Elkins, WV	N	TSA
42	WETZ	AM	New Martinsville, WV	N	TSA
43	WETZ-FM	FM	New Martinsville, WV	N	TSA
44	WNMR	FM	New Martinsville, WV	N	TSA
45	WYMJ	FM	New Martinsville, WV	N	TSA
46	WDBS	FM	Sutton, WV	N†	TSA
47	WSGB	FM	Sutton, WV	N†	TSA
48	WAFD	FM	Webster Springs, WV	N†	TSA
49	WHAW	AM	Weston, WV	N	TSA
50	WKGO	FM	Cumberland, MD	N†	OM
51	WFRB	AM	Frostburg, MD	N	TSA
52	WFRB-FM	FM	Frostburg, MD	N	TSA
53	*WFWM	FM	Frostburg, MD	N	TSA
54	*WLIC	FM	Frostburg, MD	N	TSA
55	*WAIJ	FM	Grantsville, MD	N	TSA
56	WKHJ	FM	Mountain Lake Park, MD	N	TSA
57	WMSG	AM	Oakland, MD	N	TSA
58	WWHC	FM	Oakland, MD	N	TSA
59	WWPN	FM	Westernport, MD	N	TSA
60	WOMP-FM	FM	Bellaire, OH	N†	OM
61	WRVB	FM	Marietta, OH	N†	OM
62	*WVPN	FM	Charleston, WV	N†	OM
63	WRZZ	FM	Elizabeth, WV	N†	OM
64	WGGE	FM	Parkersburg, WV	N†	OM
65	WXIL	FM	Parkersburg, WV	N†	OM
66	*WAUA	FM	Petersburg, WV	N†	OM
67	WEGW	FM	Wheeling, WV	N†	OM
68	WOVK	FM	Wheeling, WV	N†	OM
69	WWVA	FM	Wheeling, WV	N†	OM
70	*WRIJ	FM	Masontown, PA	N†	OM
71	WKST	AM	New Castle, PA	N†	OM
72	WOGG	FM	Oliver, PA	N†	OM
73	WBZZ	FM	Pittsburgh, PA	N†	OM
74	*WDUQ	FM	Pittsburgh, PA	N†	OM

	<i>Call Sign</i>	<i>Svc</i>	<i>Community of License</i>	<i>ARB</i>	<i>MSA/TSA</i>
75	WKST-FM	FM	Pittsburgh, PA	N†	OM
76	WANB-FM	FM	Waynesburg, PA	N†	OM

* = NCE FM Station; ARB: Y = AQH Rated); N† = CUM rated; N = Not rated; OM = Out-of-Market Rated Station with diary mentions.